National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: October 27, 1997

TO: B. Allan Benson, Regional Director, Region 27

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: US West Direct, Case No. 27-CA-14086

524-0050-5000, 524-0167-1067, 530-6067-4033, 530-8045-5000

This case was submitted for advice regarding whether the Employer violated Section 8(a)(1),(3),(5) by breaching a strike settlement agreement.

ACTION

For the reasons stated below, we concur with the Region that the instant charge should be dismissed, absent withdrawal, because the Employer's alleged breach of the strike settlement agreement ("SSA") does not violate the Act.

The Board will decline to find a violation of the Act where the parties assert differing, but plausible, interpretations of an agreement. In NCR Corp.,[(1)] the Board dismissed a union charge that an employer breached a collective bargaining agreement, based on the employer's "substantial claim of contractual privilege" regarding transfer of unit work.[(2)] The Board wrote that it is "not compelled to endorse either of . . . [the parties'] two equally plausible interpretations" of the contract.[(3)]

As the Board stated in Vickers, Inc., 153 NLRB 561, 570 (1965), when 'an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it,' the Board will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct.[(4)]

More recently, in Crest Litho, Inc.,[(5)] the Board held that the employer's permanent layoff of unit employees did not violate Section 8(a)(5) because the employer had "a sound arguable basis for contending that . . . [its actions] comported with contractual requirements" and there was no evidence of "animus, bad faith, or an attempt to undermine the Union's representative status."

The instant case is controlled by NCR and Crest Litho. As in those cases, the Employer has a sound and reasonable argument that it did not breach the SSA, and there is no evidence of anti-Union animus, bad faith, or an attempt to undermine the Union's representational status.

As more fully recounted in our previous Advice Memorandum dated August 16, 1996, the SSA called for the Union's "Award Grievances"[(6)] to be "settled through the grievance and arbitration procedure."[(7)] The Union's argument is that the SSA requires the Employer to arbitrate the merits of the Award Grievances using the grievance process of the prior collective-bargaining agreement ("CBA"). On February 12, 1996, the Union filed a Section 301 lawsuit to compel the Employer to do so, which was withdrawn with prejudice on June 23, 1997, pursuant to a stipulation of the parties.[(8)]

The Employer's position is that the Grievance Awards are not arbitrable, consequently it would only arbitrate the arbitrability of the Grievance Awards. It argues that the SSA requires the parties to arbitrate the Award Grievances pursuant to the CBA grievance/arbitration provisions, which provide that "only matters expressly included in this Agreement will be subject to arbitration." Since it is undisputed that the Awards Grievances are not expressly referenced in the CBA,[(9)] they do not raise an arbitrable issue. Consequently, the Employer was only willing to arbitrate the arbitrability of the Award Grievances under the

SSA.

Assuming, without deciding, that the SSA represents a meeting of the minds necessary for an agreement,[(10)] the Employer's position is soundly based on the text of the SSA as well as the text of the CBA grievance/arbitration procedure it references. Although the Union highlights the SSA's requirement that the Award Grievances be "settled" by arbitration, the Employer's argument that a decision that the Award Grievances are not arbitrable would certainly "settle" them. Moreover, since the Union admitted during discovery in the 301 lawsuit that it was never entitled to arbitrate the merits of the Award Grievances under the CBA, this admission strengthens Employer's position.

Even if the Employer's refusal to arbitrate the merits of the Award Grievances was in breach of the SSA, our conclusion that the Employer's argument for not doing so was sound and reasonable, supra at 4-5, negates any unfair labor practice. In Velan Valve Corp.,[(11)] the Board reaffirmed that a refusal to arbitrate a single grievance or class of grievances does not violate Section 8(a)(5). The Board reasoned that the Act is violated only "where an employer refuses to arbitrate all grievances, or where the refusal to arbitrate a particular class of grievances amounts to a wholesale repudiation of the contract. . . "[(12)] The latter occurs when the employer's refusal to arbitrate "has thereby unilaterally modified terms and conditions of employment during the contract term.[(13)] The Board held that the employer's conduct in Velan Valve did not meet this test, as the employer's refusal to arbitrate on timeliness grounds did not constitute a "broad policy of refusing to arbitrate grievances generally."[(14)] Here, as in Velan Valve, the Employer raised a legitimate defense to arbitration based on the text of the SSA and CBA which was plausible under the circumstances.

Likewise, the Employer's breach of the SSA would not violate Section 8(a)(3) even under the D.C. Circuit's Lone Star[(15)] analysis. Under that analysis, an unfair labor practice will be found due to breach of strike settlement agreement even if the adverse effect was "comparatively slight" only in the absence of a legitimate and substantial justification by the employer.[(16)] Here, as discussed above, the Employer did have a substantial and legitimate justification for refusing to arbitrate.

For these reasons, we conclude that the Region should dismiss the instant charge, absent withdrawal, because the Employer's alleged breach of the strike settlement agreement ("SSA") does not violate the Act.

B.J.K.

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[1] 271 NLRB 1212, 1213 (1984).

[2] The Board declined to defer to arbitration pursuant to the contract where the employer had not raised it as a defense. Id. at 1213 n.7.

[3] Id.

[4] Id.

[5] 308 NLRB 108, 111 (1992).

[6] The grievances, which were brought under the CBA, allege that a Union official was discriminatorily denied a sales award due to the Employer's unilateral change of sales award criteria and unilateral elimination of sales credits for time spent by Union officials on Union business ("Award Grievances").

[7] The instant unfair labor charge also challenged the Employer's unilateral changes. The unilateral changes portion of the charge was dismissed by the Region based on Section 10(b), which was upheld by the Office of Appeals on October 16, 1996.

[8] [*FOIA Exemption 5*].

[9] During discovery in the Section 301 lawsuit, the Union admitted that the Awards Grievances were not arbitrable under the CBA.

[10] If there was no meeting of the minds, there is no basis for a violation of the Act based on a breach of the agreement. See Waldon, Inc., 282 NLRB 583, 586 (1986).

[11] 316 NLRB 1273, 1274 (1995).

[12] Id.

[13] Id.

[14] Id. Similarly, in GAF Corp., 265 NLRB 1361, 1365 (1982),the Board declined to find a violation of Section 8(a)(5) where the employer denied union grievances over changes in the calculation of pension benefits where the employer contended they should be resolved pursuant to the pension plan claims procedure. The Board refused to assume that the employer modified its pension calculations in order to undermine the Union or out of anti-union animus. Id.

[15] Teamsters Locals 822 and 592 v. NLRB, 956 F.2d 317, 319 (D.C. Cir. 1992).

[16] Teamsters Local 822 and 592 (Lone Star Indus.), 309 NLRB 430, 431 (1992) (applying the D.C. Circuit opinion as "law of the case").